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No. 80-1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR WEINBERGER *et al.*,
Petitioners,

v.

CARLOS ROMERO-BARCELO *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether this Court should overturn a unanimous decision by the United States Court of Appeals for the First Circuit ordering a federal facility to comply with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979), by ceasing to discharge pollutants into the navigable waters of Puerto Rico until it either obtains the permit required by the Act or a Presidential exemption from the permit requirement as specified in the Act?

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BRIEF FOR THE RESPONDENTS

Carlos Romero-Barceló, the Governor of Puerto Rico, on behalf of the Government of Puerto Rico, the Board on Environmental Quality of Puerto Rico, and the mayor of the island municipality of Vieques (referred to collectively as "Puerto Rico"), hereby respond to the brief filed on behalf of the Secretary of Defense and officials of the Department of the Navy (referred to collectively as "the Navy"). Puerto Rico respectfully asks this Court to affirm the judgment of the court below.

STATUTE INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979), are reprinted in the Statutory Appendix herein.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In this case the Navy challenges the unanimous determination by the Court of Appeals for the First Circuit that a federal facility must halt a continuing violation of

the prohibition in the Federal Water Pollution Control Act[1] against the discharge of munitions into navigable waters without either obtaining a National Pollution Discharge Elimination System (NPDES) permit from the Environmental Protection Agency or securing a Presidential exemption from the statutory permit requirement as provided under the Act. The Navy discharges bombs, naval gunfire shells and other forms of ordnance into the navigable waters surrounding Vieques. Both the trial court and the Court of Appeals found that the Navy, by discharging such munitions without first obtaining the required permit or a Presidential exemption, is engaging in a continuing violation of the Act.

The Navy does not dispute that it has violated the Act and continues to do so.[2] Instead, characterizing its conduct as a "technical" violation of the Act[3]—a characterization specifically rejected by the Court of Appeals—the Navy challenges the remedy imposed by that court: an injunction requiring the Navy to obey the express prohibition in Sections 301(a) and 313(a) of the Act[4] against discharges of munitions into navigable waters without a permit or a Presidential exemption from the permit requirement.

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[1] 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979) (referred to hereinafter as the "FWPCA" or the "Act").

[2] The Navy recently admitted that it discharged at least 1,043 bombs and shells into the coastal waters of Vieques during the first seven months of 1981. *See* Affidavit of Edward Clark, August 26, 1981, and "Splash Chart" attached thereto, filed August 27, 1981, in Romero-Barceló v. Weinberger, Civ.A.No. 78-323(TR)(D.P.R.).

[3] *Cf.* Navy's Petition for a Writ of Certiorari, Appendix C, p. 162a. As used herein, the abbreviation "Navy Pet." refers to the Navy's petition for a writ of certiorari; the abbreviation "Navy Br." refers to the Navy's brief on the merits in this Court; the abbreviation "C.A.J.A." refers to the Joint Appendix filed by the parties in the Court of Appeals; and the abbreviation "S.C.J.A." refers to the Joint Appendix filed by the parties in this Court.

[4] 33 U.S.C. §§ 1311(a), 1323(a) (1976 & Supp. III 1979).

In this case, the Navy in effect is requesting this Court to create an exception to "a particular course consciously selected by the Congress." *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 195 (1978). We urge this Court to reject this effort to end-run the explicit requirements laid down by Congress.

A. The Statutory Scheme of the Federal Water Pollution Control Act

The FWPCA expressly prohibits the discharge of any "pollutant" from a "point source" into the "navigable waters" of the United States without a permit issued by the Environmental Protection Agency ("EPA") or a state with an EPA-approved permit program.[5] The Act defines the term "pollutant" to include "munitions" and "wrecked or discarded equipment." The term "point source" is defined to include vessels and other conveyances from which pollutants may be discharged.[6] Under the statutory scheme, bombs, shells and other munitions discharged into the navigable waters around Vieques are subject to the strictures of the Act.

In the words of the trial court, the language of the Act is "unambiguous."[7] The framers of the Act specifically singled out the Department of Defense as an agency obligated to pay special attention to the statutory prohibitions against discharging pollutants.[8]

Congress provided an explicit provision for exemption from the permit requirement for federal facilities. Congress empowered the President to exempt any department, agency, or instrumentality in the Executive Branch from compliance with the statutory prohibition

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[5] FWPCA §§ 301, 402, 403, 502(6), (7), (8), (12), (14), (16), 33 U.S.C. §§ 1311, 1342, 1343, 1362(6), (7), (8), (12), (14), (16) (1976 & Supp. III 1979).

[6] FWPCA §§ 502(6), (14), 33 U.S.C. §§ 1362(6), (14) (1976 & Supp. III 1979).

[7] Navy Pet. 80a.

[8] S. Rep. No. 92-414, 92d Cong., 1st Sess. 80 (1971).

against the discharge of pollutants "if he determines it to be in the paramount interest of the United States to do so." Congress also authorized the President to issue regulations specifically exempting classes of military property from the same statutory prohibition.[9]

B. The Island of Vieques

Vieques is a small island lying approximately six miles off the southeastern coast of Puerto Rico. It is approximately twenty miles long and varies in width from several hundred yards to slightly more than four miles. Nine thousand United States citizens live there.

Vieques and the surrounding waters constitute an unusual coastal ecosystem that includes coral reefs and seagrasses, mangroves, spectacular and environmentally fragile bioluminescent bays, endangered sea turtles, brown pelicans and manatees, and valuable archeological and historical resources.[10] Vieques has a long and varied cultural history.[11]

During the early 1940's the Navy acquired title to over 79 percent of the land on Vieques and currently uses this land as one of the areas that comprise the Atlantic Fleet Weapons Range.[12]

C. Navy Activities on Vieques

From 1939 to 1970, the air-to-ground and ship-to-shore training conducted by the Navy in the Atlantic Fleet Weapons Range was almost entirely aimed at targets on Culebra, a sparsely inhabited island located nine miles to the north of Vieques. Navy activity on Vieques before the 1970's was relatively insubstantial. Vieques was used principally for small-scale artillery training.[13]

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[9] FWPCA § 313(a), 33 U.S.C. § 1323(a) (1976 & Supp. III 1979).

[10] Navy Pet. 2a-3a. *See generally* C.A.J.A. 191-92, 340-45.

[11] C.A.J.A. 86-87, 144, 340-44.

[12] Navy Pet. 4a.

[13] C.A.J.A. 541-46, 551, 557-59, 1309-70, 1375, 1385, 1388-89, 1490-98.

By 1970, significant civilian and governmental opposition had developed to the military operations on Culebra. This opposition was voiced not only in Puerto Rico but in the mainland United States. Consequently, Congress arranged through three different Military Construction Authorization Acts in the early 1970's for the curtailment of Navy activities on Culebra.[14]

In 1971, the Navy began to increase its ship-to-shore shelling ("naval gunfire support") and air-to-ground bombing at Vieques.[15] Between 1974 and 1977, the Navy increased by over *900 percent* the number of 500 (MK82), 1,000 (MK83), and 2,000 (MK84) pound bombs dropped on and around Vieques. In 1977 alone, the Navy dropped approximately 5 million pounds of ordnance on and around Vieques.[16]

The Navy's bombing, shelling, and other military activities have resulted in the discharge of munitions and other pollutants into the coastal waters of Vieques, and have caused damage to fragile coral reefs, seagrasses, beaches, lagoons and other marine habitats and organisms.[17] By the Navy's own admission, the beaches and

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[14] Military Construction Authorization Act of 1971, Pub. L. No. 91-511, 84 Stat. 1204 (1970); Military Construction Authorization Act of 1972, Pub. L. No. 92-145, 85 Stat. 394 (1971); Military Construction Authorization Act of 1974, Pub. L. No. 93-166, 87 Stat. 668 (1973). In 1975, the Navy ceased its Culebra operations.

[15] C.A.J.A. 521-22, 533, 538, 547-48, 552. The Navy knew that the increase of bombing and shelling on the more populous Vieques was likely to spark substantial opposition. In a confidential communique in December, 1971, a Navy official wrote that the Navy should be very careful not to appear to increase the tempo of training operations on Vieques. An internal Navy memorandum in April, 1972, warned that because of the "extreme sensitivity" of any plan for increasing bombing and shelling at Vieques, all Navy message traffic on the subject should be "flagged limited distribution special handling." S.C.J.A. 106; *see also* C.A.J.A. 1054, 1056, 1413; *see generally* S.C.J.A. 97-185.

[16] S.C.J.A. 73-74; C.A.J.A. 1490-98, 1782-94, 1796-1952.

[17] C.A.J.A. 256-64, 281-329.

waters surrounding Vieques are "saturated" with ordnance and some areas are "supersaturated".[18]

The Navy knew long ago of the damage that would be inflicted on the marine environment of Vieques by an increase of bombing and shelling there. A report prepared for the Navy in 1972 warned that expanded range use on Vieques "would cause a subtle and adverse impact [on] the total marine environment of these waters." The report warned that coral reefs in Vieques coastal waters would be irreparably damaged. "Although much of the resulting ecological damage may be repaired by nature in time, some damage to coastal zones, and reef systems in particular, is irreparable." [19]

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[18] C.A.J.A. 703-04, 757-60, 810-12, 1518-52, 1603-19. Items discovered in the waters of Vieques near the reefs include exploded and unexploded bombs and shells, practice ordnance, parachutes, parachute cables, flares, flare casings, barges and other military vessels, machine gun rounds, bazooka rockets and many unidentifiable ordnance fragments. C.A.J.A. 1782-1952; S.C.J.A. 76-91. As stated by one of the Navy's witnesses at trial:

> The fringing reefs on both sides of the north central cove in Bahia Salina del Sur have been extensively bombed. Several craters in the reefs are visible in recent color aerial photos (flown August 1978 by the U.S. Navy).

S.C.J.A. 84-85.

During the trial, a shell fired from a Navy destroyer at Vieques missed its intended target by about six miles; the shell landed near a private vessel. C.A.J.A. 2738. The Navy admits that

> in view of the *large amount of live ordnance dropped in the water in the Surface Danger Area surrounding eastern Vieques and the resultant amount of unexploded ordnance ending up on the ocean bottom*, it should be considered paramount for safety that steps be taken to forbid at all times, diving, anchoring, bottom fishing and trapping within at least one mile of the Vieques coast inside the Surface Danger Area.

S.C.J.A. 76 (emphasis added).

[19] C.A.J.A. 284-85. "Aerial and ship-to-shore bombardment of impact zones is usually accompanied by some ordnance falling long or short of the target areas. The potential adverse impact from this threatens damage to thalassia [*i.e.*, seagrass] grass beds and

The Navy did not prepare an environmental impact statement with respect to its activities on Vieques as required by the National Environmental Policy Act.[20] It did not conduct a survey to locate historical sites or nominate sites for inclusion in the National Register of Historic Places, as required by the National Historic Preservation Act of 1966.[21] It did not consult with the Departments of Interior and Commerce as required by the Endangered Species Act or identify the existence of endangered species, as required by its own rules issued pursuant to the Endangered Species Act.[22] And it did not obtain an NPDES permit or a Presidential exemption for its discharges of munitions into the coastal waters of Vieques, as required by the FWPCA.

II. PROCEEDINGS IN THE TRIAL COURT

In an effort to compel the Navy to comply with the requirements of these and other statutes, Puerto Rico brought suit in the United States District Court for the District of Puerto Rico on March 1, 1978, against the Navy.

The location of Naval facilities on Vieques and the nature of Navy activity there made it difficult for experts to assemble evidence concerning the impact of the Navy's activities on the marine environment. Navy ex-

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mangrove zones . . . . Direct fish kills from the impact of stray ordnance may be expected, however, a more serious consequence is the long-term damage to aquatic life forms resulting from the explosive destruction of habitat, turbidity that reduces the photosynthesis in turtle grass zones [*i.e.*, seagrass] and the sedimentation of live coral systems." S.C.J.A. 77.

For a discussion of the importance of coral reefs and seagrass in the marine ecosystem, see C.A.J.A. 281, 316-17.

[20] 42 U.S.C. § 4321 *et seq.* (1976).

[21] 16 U.S.C. § 470 *et seq.* (1976 & Supp. IV 1980), as amended by the National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980).

[22] 16 U.S.C. § 1531 *et seq.* (1976 & Supp. IV 1980). *See* OPNAVINST 6240.3E § 10702, C.A.J.A. 2370-71.

plosives experts stated that "no one should be allowed there [*i.e.*, at "the reef"] because the risks of losing life or limb is more than 80 percent." [23] Puerto Rico experts were given permission to inspect coral reefs only after signing affidavits prepared by the Navy entitled "Acknowledgment of Danger(s) and Assumption of the Risk." The affidavits stated that "the Waters contain unexploded ordnance which could detonate and cause death or injury if inadvertently activated." [24] Furthermore, the Navy's shelling and bombing schedule limited the opportunities for inspection of the marine environment.

The trial commenced in September, 1978, and lasted three months and involved highly conflicting testimony about the effect of Navy activity on the marine environment.

The trial court concluded that "there is no question . . . but that there was an increase in the intensity of operations at Vieques after 1975." [25] As a result, ordnance falls into the coastal waters of Vieques "with some frequency," [26] causing damage to coral reefs and seagrass beds.[27]

Despite the evidence of substantial discharges of ordnance into navigable waters, the trial court found that Puerto Rico had not proven that the Navy's activities had yet irreparably damaged the marine environment. "At present," the court concluded, "there is no irreparable damage to coral reefs in Vieques and what damage does exist can be repaired by the reefs' normal growth processes. . . . [T]he damage to seagrass from the activities of Defendant Navy is neither substantial, permanent nor

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[23] Transcript of Hearing before district court, April 10, 1978, p. 156.

[24] C.A.J.A. 1604-1605.

[25] Navy Pet. 148a. The Navy's reprint of the trial court's finding concerning the 1977 hours of naval gunfire (*id.*) contains a typographical error. The correct number of hours is 1016.9, not 106.9.

[26] Navy Pet. 79a.

[27] *Id.* 116a-117a, 120a, 148a.

irreversible." [28] With respect to the Vieques beaches, the court concluded merely that "the evidence is at best inconclusive that these activities have a *substantial* negative ecological impact on these beaches." [29]

By opinion and order dated September 17, 1979, the district court ruled in favor of Puerto Rico on three of its major claims. The court found that the Navy had violated the National Environmental Policy Act of 1969 [30] by failing to file an environmental impact statement for its activities on Vieques, and had violated the National Historic Preservation Act of 1966 and an implementing Executive Order by failing to nominate historic sites for inclusion in the National Register of Historic Places.[31]

The trial court also found that the Navy violated the FWPCA by discharging munitions into navigable waters without first obtaining an NPDES permit from the EPA. This ruling was based upon the "unambiguous language" of the Act.[32]

At the conclusion of its opinion, the court addressed the question of the remedy for the Navy's violations

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[28] Navy Pet. 116a, 121a.

[29] Navy Pet. 125a (emphasis in original).

[30] 42 U.S.C. § 4321 *et seq.* (1976).

[31] *See* Executive Order 11593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C.A. § 470 at 28 (1974). With respect to the Navy's nonfeasance prior to the filing of the complaint, the court noted:

> There is little doubt in our mind but that Defendant Navy did not at any time prior to the commencement of the present actions locate, inventory and/or nominate any site or otherwise that appear to qualify for listing on the National Register, as required by Section 2(a) of the Executive Order.

Navy Pet. 136a. The Executive Order required locating, inventorying and nomination of historic sites by July 1, 1973. The Navy, therefore, should have located, inventoried and nominated historic sites on Vieques by that date, almost five years before Puerto Rico filed its complaint in this action.

[32] Navy Pet. 79a-80a. The court dismissed the remaining counts in the complaint.

of federal law. The court began its analysis by observing that:

> the issuance of an injunction in the federal courts is governed by general principles of equity. . . .
>
> Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief, is the court's discretion. Being an extraordinary remedy, it is not granted routinely.[33]

The court then cited this Court's decision in *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944), as authority.[34] But the court did not analyze the precise holding in *Hecht* and did not acknowledge the significant factual distinctions between that case and this. The court failed to recognize that the Court in *Hecht* was speaking in the context of a case where the violator had voluntarily complied with the statute in question and where there was no likelihood of continuing violation and, therefore, no need for an injunction to carry out the terms of the statute. The trial court also did not acknowledge the existence of this Court's admonition in *Hecht* that where a federal statute is involved judicial discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." 321 U.S. at 331.

In discussing the remedy to be issued, the trial court did not focus on the requirements of each violated statute or on the necessity of an injunction to prevent a continuing violation of a federal statute. Instead, it "balanced" different considerations to determine whether injunctive relief should be issued.

The court stated that the activities of the Navy were "not causing any appreciable harm to the Vieques

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[33] Navy Pet. 160a.

[34] *Id.*

ecology," and that injunctive relief would be merely "punishment." [35] It indicated that the fact that Puerto Rico had not sued earlier was a reason not to issue an injunction.[36] Finally, the court discussed at considerable length military and national security considerations, noting that "a well trained and effective naval force, even in time of peace, is essential to the National welfare." [37] This discussion was based upon the trial testimony of Navy personnel and upon "judicial notice of the present state of World affairs." [38] The court then determined that it would be in the best interests of the United States not to enjoin any of the Navy's military activities.

The court ordered the Navy to proceed "with all deliberate speed" to "[f]ile for and seek a NPDES permit for the release or firing into the waters of Vieques," to nominate historic sites to the National Register of Historic Places, and to file an environmental impact statement.[39]

III. PROCEEDINGS IN THE COURT OF APPEALS

The Navy did not appeal from any portion of the trial court's ruling, including the court's finding that the Navy had violated the FWPCA.[40] Puerto Rico appealed from portions of the decision to the United States Court of Appeals for the First Circuit. Puerto Rico specifically requested reversal of the trial court's refusal to issue injunctive relief with respect to the Navy's continuing violation of the FWPCA.

On January 26, 1981, the Court of Appeals issued its decision. The Court of Appeals separately discussed the remedies ordered for the Navy's violations of the

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[35] *Id.* 162a.

[36] *Id.* 162a-163a.

[37] *Id.* 164a.

[38] *Id.* 174a.

[39] *Id.* 165a.

[40] *Id.* 49a.

National Historic Preservation Act, NEPA, the Endangered Species Act, and the FWPCA.

A. *National Historic Preservation Act.* The Court of Appeals rejected the trial court's conclusion that the Navy had no further obligation to locate historic sites in addition to those located in the survey conducted after the commencement of the lawsuit. However, the Court of Appeals found that it was not necessary to enjoin the Navy's training activities in the interim. "Nothing in the present record suggests that the training activities as a whole endanger the additional sites likely to be located." [41] The court accordingly observed that an injunction with respect to the Navy's bombing and shelling activities was not necessary to put the Navy into compliance with its obligations under the National Historic Preservation Act to locate and nominate sites and mitigate damage to historic sites. Compliance could be effected by making further efforts to locate historic sites, by nominating known and discovered historic sites for inclusion in the National Register of Historic Places, and by protecting these sites.[42]

B. *NEPA.* In its review of the trial court's remedy for the Navy's violation of the National Environmental Policy Act, the Court of Appeals declared the issue moot. The Navy had prepared and filed a final environmental impact statement by the time the case was argued in the Court of Appeals. Accordingly, no injunction was necessary to put the Navy into compliance with NEPA, and the court found that it did not need to address the issue of whether the Navy's activities should have been halted for failure to prepare and file an EIS.[43]

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[41] *Id.* 50a. The trial court also had found that there were no significant archeological sites in the target areas because "[a]ny that may have existed there have in all probability been destroyed." *Id.* 137a.

[42] Navy Pet. 49a-50a.

[43] *Id.* 50a.

C. *Endangered Species Act.* The Court of Appeals found that the Navy had violated Section 7 of the Endangered Species Act [44] by failing to obtain a biological opinion (pursuant to that Section's consultation requirement) that discussed the impact of its training activities upon endangered and threatened species on Vieques.[45] The Court of Appeals noted that although the Navy had obtained a biological opinion after the decision of the trial court, this opinion was not in the record and therefore could not be reviewed by the Court of Appeals. The court remanded the entire issue of compliance with the Endangered Species Act to the trial court to allow Puerto Rico to challenge the biological opinion and to let the trial court consider Puerto Rico's claims under the Act in the light of the biological opinion.[46]

D. *FWPCA.* The Court of Appeals clearly recognized that the Navy's failure to obtain an NPDES permit

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[44] Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976).

[45] Navy Pet. 50a. The court stated:

> By ignoring the statutory mandate, the Navy has sidestepped the administrative process that Congress expected would resolve many of the conflicts between agency action and the requirements of § 7. If the Navy had sought consultation within a reasonable period following the adoption of the Act, the burden of litigating Puerto Rico's claim might have been avoided.

Id. 40a.

The Court of Appeals indicated that a biological opinion could alter the district court's conclusions about the Navy's compliance with certain of its obligations under the Act. *Id.* 41a.

It bears note that to assist agencies to comply with the consultation requirements of Section 7 of the Act, procedures had been set forth in "Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973". (April 22, 1976), which were referenced in the Navy's own rules. OPNAVINST 6240.3E § 10702, C.A.J.A. 2371. *See also* 50 C.F.R. § 402 (1981); 43 Fed. Reg. 870 *et seq.* (Jan. 4, 1978). The Navy did not initiate consultation with the United States Fish and Wildlife Service until the summer of 1979.

[46] Navy Pet. 51a.

presented a problem different from that involved with the Navy's other violations. Here, the court was confronted with an issue that was not moot and with an admitted and ongoing statutory violation.

As to this continuing violation, the Court of Appeals ruled that "the district court erred in undertaking a traditional balancing of the parties' competing interests." [47] The court continued:

> Congress has prohibited "the discharge of any pollutant," 33 U.S.C. § 1311(a), which includes the Navy's dropping of ordnance into the coastal waters, unless a NPDES permit has been secured pursuant to 33 U.S.C. § 1342. Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit.[48]

To the Court of Appeals, the statute made it irrelevant that "*on this record*" the trial court did not "clearly err" in finding that the Navy's discharge of munitions caused no significant harm to the environment.[49] The statutory scheme clearly contemplated that the Administrator of the EPA—not the court—was responsible for determining whether particular discharges caused harm to the environment. Furthermore, the court's review of the record indicated that the permit process would not be a mere formality:

> The EPA might find substantial harm even though the court had not. . . . [T]he permit process "might reveal substantial environmental consequences," *City of New York v. United States*, 337 F. Supp. 150, 160 (E.D.N.Y. 1972), *quoted in Realty Income Trust v. Eckerd*, 564 F.2d at 456, that would lead the Admin-

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[47] *Id.* 48a.

[48] *Id.*

[49] *Id.* 49a (emphasis added).

istrator to deny the application or grant only a limited permit.[50]

The court specifically rejected the trial court's characterization of the Navy's conduct as a "technical violation" of the Act. The court also noted that "the Navy has utterly disregarded the statutory mandate."[51] The court further observed that because the statutory prohibition against the discharge of pollutants can only be lifted by having a permit, the mere filing of an *application* for the permit would not put the Navy into compliance with the Act.[52]

The Court of Appeals also dismissed the trial court's reliance upon national security considerations as a reason for refusing to carry out the express requirements of the Act. The Court of Appeals indicated that Congress had expressly addressed and resolved the matter of national security in the FWPCA by providing for Presidential exemptions. If an injunction would jeopardize Navy preparedness, then the Navy "is free to request the President to exempt it from the NPDES requirements in the interest of national security. *See* 33 U.S.C. § 1323(a)."[53]

The Court of Appeals then vacated the trial court's order and remanded with narrow instructions to order the Navy "to take all steps to insure that no ordnance

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[50] *Id.* 48a-49a.

[51] *Id.* 49a.

[52] *Id.*

[53] *Id.* In a lengthy footnote at page 24 and 25 of its brief, the Navy lamely suggests that its failure to comply with the permit requirement was attributable in part to Puerto Rico's failure to provide it with the sixty-day notice provided in Section 505(b)(1)(A) of the FWPCA, 33 U.S.C. § 1365(b)(1)(A) (1976), as a prerequisite to a citizens suit to enforce the Act. Puerto Rico did comply with the notice requirement by serving the Navy with notice and thereafter filing an unopposed motion for leave to file a supplemental complaint. The district court ruled that Puerto Rico had satisfied the notice requirement. C.A.J.A. 71. The Navy did not appeal this ruling.

is discharged into the coastal waters of Vieques until such time as it obtains a NPDES permit." [54]

SUMMARY OF ARGUMENT

The Navy has long flouted the permit requirements of the FWPCA. The text, legislative history and judicial construction of the Act convincingly illustrate that a permit must be obtained before pollutants may be discharged into the navigable waters of the United States. The Act itself and an unbroken line of precedent in this Court clearly recognize that federal courts are not authorized to employ equitable discretion to allow a continuing violation of such a statutory requirement.

ARGUMENT

I. WHERE A FEDERAL STATUTE IS BEING VIOLATED THE EQUITABLE DISCRETION OF A COURT IS TO BE USED TO ENSURE FULL COMPLIANCE.[55]

A. A Court Does Not Have Equitable Discretion to Permit a Continuing Violation of a Federal Statute.

1. *The Standard Derived from Litigation Between Private Parties Does Not Apply to the Issuance of Injunctive Relief for Violations of Federal Statutes.*

The injunction, once an "extraordinary" remedy administered by subordinate chancery courts,[56] is today a common tool to ensure compliance with civil statutes. Historically, equity operated as a highly discretionary

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[54] Navy Pet. 49a.

[55] Counsel for Puerto Rico are indebted to Zygmunt J.B. Plater, Visiting Professor of Law at Boston College Law School, for allowing them to review the manuscript of his forthcoming article entitled "Statutory Violations and Equitable Discretion," to be published next year. Some of the analysis contained in this brief was inspired by this manuscript.

[56] *Cf.* Petroleum Exploration, Inc. v. Public Service Comm'n of Kentucky, 304 U.S. 209, 218 (1938). *See also Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 997 (1965); J. Story, *Equity Jurisprudence* § 33 (1st ed. 1836).

"gloss" on the common law to be invoked when traditional legal remedies and procedures did not afford the complainant adequate relief.[57] Because of its discretionary nature, equity jurisprudence developed an extraordinary array of limitations and exceptions designed to prevent the Chancellor from expanding his remedial jurisdiction into realms properly reserved for courts of law.[58]

The twentieth-century injunction is a remedy of a different sort. The merger of law and equity has removed the traditional tension between the different forms of judicial relief. Today, many of the historical limitations on the injunctive remedy "have become equitable fictions."[59] The modern statutory injunction bears little resemblance to its common-law ancester, and many of the maxims and aphorisms that were invoked to limit the grant of injunctive relief in the era of the Chancellor have lost their meanings in the modern context.

In private litigation, courts have traditionally engaged in a "balancing" analysis to determine whether the hardship suffered by the plaintiff in the absence of equitable relief exceeds the potential harm to the defendant in the event that an injunction is granted. A court may exercise broad discretion in striking that balance, including the discretion to refrain from issuing an injunction.[60]

This discretion is limited, however, when the plaintiff alleges and proves that the defendant is engaged in a continuing violation of a federal statute. This Court has long heeded Justice Frankfurter's familiar admonition that actions to enjoin continuing violations of federal law should be adjudged in accordance with a different and more limited standard of discretion:

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[57] F. Maitland, *Equity* 18 (2d rev. ed. 1936).

[58] *See generally* O. Fiss, *Injunctions* 2-13 (1972).

[59] *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 996 (1965).

[60] *See, e.g.*, Leonardo v. Leonardo, 145 F. 2d 849, 851 (D.C. Cir. 1944).

> "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609-10 (1952) (Frankfurter, J., concurring).

2. *A Consistent Line of Supreme Court Decisions Precludes the Exercise of Equitable Discretion to Permit a Continuing Violation of a Federal Statute.*

Without any analysis of the line of cases decided by this Court and the rulings of the lower courts, the Navy attempts to manufacture some inconsistency in the applicable law. The essential argument raised by the Navy in this case is that "[t]he court of appeals should have looked to *Hecht Co. v. Bowles*, rather than *TVA v. Hill*, for the analysis that controls this case." [61] This argument incorrectly implies that this Court's decisions in those two cases cannot be harmonized. As discussed below, the cases are consistent with each other and with an unbroken line of other Supreme Court cases, all of which support Puerto Rico's position here.

One of the early cases to discuss the standards that govern the issuance of injunctive relief to remedy the violation of a federal statute is *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). In that case, the government sought to enforce a federal statute prohibiting municipalities from reselling water rights obtained by federal grant. San Francisco acknowledged that it had resold water rights to a private utility company, but claimed that an injunction should not enter be-

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[61] Navy Br. 9 (citations omitted).

cause the balancing of equities did not favor injunctive relief. Rejecting the city's claim, this Court held that the case "does not call for a balancing of equities or for the invocation of the generalities of judicial maxims. . . . Congress provided that the [defendant] shall at all times comply with and observe . . . the conditions specified in this Act." 310 U.S. at 30. Injunctive relief was required to halt continuing violation of the Act:

> The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued [statutory violations] is both appropriate *and necessary.*

301 U.S. at 31 (emphasis added).

Thereafter, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court once again rejected unfettered "balancing" as the analytical standard for assessing whether a violation of a federal statute should be allowed to continue. The statute at issue in *Hecht* was the Emergency Price Control Act of 1942,[62] a wartime measure granting broad powers to the Office of Price Administration to fix maximum prices for commodities and services. The Hecht Company, operator of a large department store in Washington, D.C., unwittingly sold consumer goods between May and October, 1942, at prices in excess of the OPA maxima. Hecht argued that violations were inevitable when a new and highly complex scheme of price regulation was applied to a retail establishment the size of a department store. It asserted that steps had been taken to prevent further overcharges in the future. These representations satisfied the trial court that violations were not likely to continue and that issuance of an injunction would serve no purpose.

This Court agreed, and did so in a manner that deliberately and clearly acknowledged the existence of limitations on judicial discretion where federal statutes were

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[62] 56 Stat. 23, 50 U.S.C.A. App. § 901 *et seq.* (1951).

violated. The "traditional practices" of equity courts, wrote Justice Douglas, must be "conditioned by the necessities of the public interest which Congress has sought to protect" by enacting the Price Control Act. 321 U.S. at 330. This necessarily limits the exercise of discretion by federal courts:

> [T]heir discretion under [the Act] must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases. That discretion should reflect an acute awareness of the Congressional [policy].

Id. at 331 (emphasis added).

The Court refined this doctrine in two notable cases decided in the 1950's, each involving the authority of the Executive Branch to prevent crippling steel strikes. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court reviewed President Truman's order requiring the seizure of all steel mills in the United States to assure continued production of steel for the Korean War effort. The seizure order exceeded the statutory and constitutional authority of the Executive Branch. The government argued, nevertheless, that in balancing the transgression of the President against the compelling military necessities of the Korean War, the President should not be enjoined. The Court flatly rejected the government's argument. "When Congress itself has struck the balance," wrote Justice Frankfurter in his concurring opinion, "a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion." 343 U.S. at 610.

Justice Frankfurter revisited the same issue seven years later in a lengthy concurring opinion accompanying the Court's *per curiam* judgment in *United Steelworkers of America v. United States*, 361 U.S. 39, 44-62 (1959). The case grew out of President Eisenhower's successful effort to obtain an 80-day back-to-work order from a dis-

trict court ending an industry-wide strike in the basic steel industry. The Steelworkers raised many equitable arguments in defense of their position that the strike should not be enjoined. The issue before the Court, wrote Justice Frankfurter, was "whether the District Court was to exercise the conventional discretionary function of equity in balancing conveniences as a preliminary to issuing an injunction." 361 U.S. at 55. His answer was succinct:

> We conclude that under the national emergency provisions of the Labor Management Relations Act it is not for judges to exercise conventional discretion to withhold an eighty-day injunction upon a balancing of conveniences.
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> "Discretionary" jurisdiction is exercised when a given injunctive remedy is not commanded as a matter of policy by Congress, but is, as a presupposition of judge-made law, left to judicial discretion. Such is not the case under this statute. The purpose of Congress expressed by the scheme of this statute precludes ordinary equitable discretion.

Id. at 56.

In *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), the trial court refused to order back pay for minority employees who were systematically assigned to low-paying jobs in violation of Title VII of the 1964 Civil Rights Act. Noting that back pay was an equitable remedy, the trial court ruled that the equities favored the employer because there was no evidence of bad faith on the employer's part and the plaintiffs had waited an unreasonably long time before asserting their back pay claim. On appeal, this Court held that the trial court had abused its discretion by declining to award back pay for those reasons. "It is true," wrote Justice Stewart for the Court, "that 'equity eschews mechanical rules . . . [and] depends on flexibility.'" 422 U.S. at 417, quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). He continued:

> But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot."

Id., quoting *Gee v. Pritchard*, 2 Swanston 403, 414, 36 Eng. Rep. 670, 674 (1818).

This Court's decision in *Rondeau v. Mosinee Paper Corporation*, 422 U.S. 49 (1975), also illustrates the narrow range of equitable discretion that may be exercised by courts when there is a continuing violation of a federal statute. In *Rondeau*, an investor committed technical violations of the securities laws by making large purchases of the plaintiff company's common stock without complying with statutory disclosure requirements under the Williams Act.[63] The violations were promptly corrected after they were discovered, and the defendant soon thereafter stopped purchasing the company's stock and discontinued his plan to acquire a controlling interest in the company. This Court, speaking through Chief Justice Burger, agreed with the trial judge that under these facts an injunction was unnecessary: "[T]he usual basis for injunctive relief, 'that there exists some cognizable danger of recurrent violation,' is not present here." 422 U.S. at 59, *quoting from United States v. W. T. Grant Company*, 345 U.S. 629, 633 (1953). As in *Hecht*, the issuance of an injunction was not necessary to prevent a future violation of the Act.

This Court's most recent pronouncement on the subject, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), is fully consistent with previous rulings concerning the relief that should be issued to remedy violations of federal statutes. The issue, once again, was whether a trial court should have halted a continuing violation of federal law (in that case, the Endangered Species Act of 1973), notwithstanding the fact that an injunction would

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[63] 15 U.S.C. §§ 78m(d), 78n(d), (e), (f) (1976 & Supp. IV 1980).

prevent the operation of a nearly completed federal dam and conflicted with several countervailing equitable considerations. After determining that the agency's action would violate the statutory requirement, this Court ruled that the violation must be prevented and the district court should have issued the requested injunction.

Hecht was cited in *TVA v. Hill* for the proposition that a trial court is not "mechanically obligated to grant an injunction for every violation of law." 437 U.S. at 193. But the Court recognized that the narrow holding in *Hecht* could not be used to permit a continuing violation of a statute.[64] Thus, after citing *Hecht*, this Court stated:

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[64] That voluntary compliance with a federal statute can obviate the need for a statutory injunction in the *Hecht* situation was a focus of discussion during oral argument in the *TVA v. Hill* case on April 18, 1978. The Court engaged in this colloquy with counsel for the respondents:

> QUESTION: . . . Do you suggest that any of the legislation passed here has abrogated the normal equity function of a United States District Judge in granting an injunction, the very extraordinary relief that is sought here—
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> MR. PLATER: Not at all, Your Honor.
>
> QUESTION: —that—are you suggesting that he should not function as he does with any other application for an injunction?
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> MR. PLATER: Your Honor, that question is an important one. We do not advocate the stripping of this Court or any court of the equitable powers. And indeed, Your Honor, we rely on Your Honor's decision in *Rondeau v. Moisinee Paper Corporation*, and that is to say, the equity courts have the full panoply of powers required to enforce the laws of Congress.
>
> QUESTION: But *Hecht against Bowles* says you don't get an injunction automatically for a statutory violation.
>
> MR. PLATER: That's correct, Your Honor. And we do not insist on an injunction. If petitioner agrees to obey the law voluntarily, as the Hecht Corporation did in that case, or as the Moisinee Paper Corporation agreed [sic] in Your Honor's case—
>
> QUESTION: Then you don't need an injunction?

> Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought . . . . We have no . . . mandate from the people to strike a balance of equities . . . [when] Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck . . . .
>
> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

437 U.S. at 194-95.[65]

The decisions of this Court establish three principles of law that control the disposition of this case. First, the court must look to the statute, rather than the competing interests of the parties, and must provide a remedy that vindicates the requirements and objectives of the statute in question. Second, federal courts are not stripped of *all* discretionary authority to fashion relief. A court, for example, still has the sort of discretion exercised in *Hecht* and *Rondeau* to assess the *likelihood of a continuing violation* in order to determine whether injunctive relief is

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MR. PLATER: That's precisely right.

QUESTION: It's academic.

MR. PLATER: And the law would be complied with.

Transcript of Proceedings 51-52.

[65] In footnote 34 of its opinion in TVA v. Hill, 437 U.S. at 188, this Court distinguished as "completely inapposite" the cases decided under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1976) ("NEPA"), in which courts have refused to enjoin ongoing projects for failure to prepare an adequate environmental impact statement. Ironically, the trial court in the case at bar relied heavily on the inapposite NEPA cases for its denial of injunctive relief. Navy Pet. 161a.

necessary to halt a violation. Third, in none of these cases does this Court hold that a court has the equitable discretion to permit an ongoing violation of a federal statute. To the contrary, each case recognizes that injunctive relief is necessary to halt an ongoing violation of a federal statute when enforcement is sought.

These standards have been applied by the lower federal courts to enjoin a wide range of statutory violations. For example, in *Commodity Futures Trading Commission v. Hunt*, 591 F. 2d 1211 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979), the trial court found that the Hunt family violated Section 6c of the Commodity Exchange Act [66] and implementing regulations but nevertheless refused to order any injunctive relief. The court of appeals concluded that the trial court had abused its discretion: "Actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations." 591 F.2d at 1220.[67]

In *Wilderness Society v. Morton*, 479 F. 2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973), the issue was whether construction of the Alaska Pipeline could proceed in the absence of legally valid construction permits. The Interior Department had failed to observe a provision in the Mineral Leasing Act of 1920 limiting the permissible width of rights-of-way across federal lands. The trial court refused to enter an injunction, citing the importance of the nearly-completed pipeline to the economy of Alaska and the well-being of its citizens. The

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[66] 7 U.S.C. § 13a-1 (1976).

[67] In determining the likelihood of future violations, the court must examine several factors. Past conduct may be highly suggestive of the prospect of continuing violations, particularly "when a defendant persists in its illegal activities 'right up to the day of the hearing in the district court . . . .'" 591 F.2d at 1220, quoting from Commodity Futures Trading Comm'n v. British American Commodity Options Corp., 560 F. 2d 135, 142 (2d Cir. 1977).

court of appeals agreed that further delay would exact a heavy social and economic cost. But following the principles established by this Court, the court then stated:

> Recognizing these hardships, however, we nevertheless are constrained to enjoin the Secretary of the Interior from issuing one of the permits which all parties recognize is necessary for construction of the pipeline . . . . *We must enjoin* issuance of this special land use permit until Congress changes the applicable law . . . .

479 F. 2d at 847-48 (emphasis added).[68]

A recent court decision had no difficulty in harmonizing the holding in *Hecht* with the analysis of this Court in *TVA v. Hill*. Only two months before the Navy filed its petition for a writ of certiorari in this case, the federal government successfully defended before the Sixth Circuit the issuance of an injunction without an evidentiary hearing on the "equities" to enforce new source performance standards under the Clean Air Act. *United States v. City of Painesville, Ohio*, 644 F. 2d 1186, 1193-94 (6th Cir. 1981).[69]

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[68] Congress subsequently amended the Mineral Leasing Act specifically to permit completion of the Alaska Pipeline. Pub. L. No. 93-153, 87 Stat. 576 (1973); *see* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 244 n. 11 and accompanying text (1975). *See also* Lathan v. Volpe, 455 F. 2d 1111 (9th Cir. 1971); Arlington Coalition on Transportation v. Volpe, 458 F. 2d 1323 (4th Cir.), *cert. denied sub nom.* Fugate v. Arlington Coalition on Transportation, 409 U.S. 1000 (1972); SEC v. Advance Growth Capital Corp., 470 F. 2d 40, 53 (7th Cir. 1972); West Virginia Division of Izaac Walton League v. Butz, 522 F. 2d 945, 955 (4th Cir. 1975); Studebaker Corp. v. Gittlin, 360 F. 2d 692, 698 (2d Cir. 1966); Henderson v. Burd, 133 F. 2d 515, 517 (2d Cir. 1943).

[69] The court's lucid discussion of *Hecht* and *TVA v. Hill* is reproduced at pages 13-14 of Puerto Rico's Brief in Opposition to the Navy's Petition for a Writ of Certiorari.

B. The Court Below Correctly Ruled that the Trial Court Erred by Refusing to Enjoin the Navy's Ongoing Violation of the FWPCA.

At trial, Puerto Rico proved that the Navy has violated and continues to violate the FWPCA by discharging bombs, shells and other munitions in coastal waters without first obtaining an NPDES permit. The Navy conceeds that it has violated the Act. The evidence showed that the Navy persisted in its violations "right up to the day of the hearing," *Commodity Futures Trading Commission v. British American Commodity Options Corporation*, 560 F. 2d 135, 142 (2d Cir. 1977), and beyond. It will continue to violate the Act until it either obtains an NPDES permit or a Presidential exemption from the permit requirement.

In its review of the trial court decision, the Court of Appeals correctly observed that the trial court had not applied the statutory analysis required by the cases involving violations of federal statutes. The Court of Appeals reviewed the applicable statutory and common law requirements. The court noted that the Act imposed "an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed." [70] The court critized the trial court for failing to protect the integrity of the permit process by allowing the statutory violation to continue. Finally, the court observed that the Act expressly provided for a Presidential exemption if the prohibition against the continued violation would affect military preparedness. The court's analysis of these considerations squarely tracked the inquiries required by *City and County of San Francisco*, *Hecht*, *Rondeau*, and *TVA v. Hill*. In light of this precedent, the Court of Appeals properly ordered a halt to the violation of the Act.

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[70] Navy Pet. 48a.

II. INJUNCTIVE RELIEF IS REQUIRED IN THIS CASE TO ENFORCE THE REQUIREMENTS OF THE FEDERAL WATER POLLUTION CONTROL ACT.

A. Introduction

This Court's decision in *TVA v. Hill* provides an object lesson in the relationship between Congress and the judiciary in applying and enforcing federal law. It is Congress' task, observed the Chief Justice, to "formulate legislative policies and mandate programs and projects." Courts cannot, under the guise of equitable discretion, frustrate Congressional prohibitions by refusing to "enforce them where enforcement is sought." 437 U.S. at 194. Courts abuse their discretion when they substitute their own notions of equity for those expressed by Congress:

> We have no . . . mandate from the people to strike a balance of equities . . . [when] Congress has spoken in the plainest of words, making it abundantly clear that the balance has [already] been struck.

Id.

By enacting the FWPCA, Congress again has spoken in the plainest of words. The Act embodies a vigorously stated, clearly expressed policy to ban the discharge of pollutants except in conformity with a permit system that requires all dischargers to have a permit issued pursuant to a permit process. It specifies the manner in which federal facilities should be treated and how national security interests should be handled. It is not the province of a court to frustrate "a particular course consciously selected by the Congress" (437 U.S. at 194) by deciding that statutory violations should be allowed to continue.

The Navy seeks to read equitable flexibility into the FWPCA by using a canon of statutory construction purportedly divined from *TVA v. Hill*. According to the Navy, that case stands for the principle that a court has discretion to permit an ongoing violation of an explicit prohibition unless the statute *in addition* contains a " 'clear ordering of priorities' which the courts are powerless

to alter." [71] According to the Navy, this discretion is removed only if the text and legislative history of a federal statute evince some clear congressional intent "to eliminate the traditional discretion of the courts in enforcing the statutory requirements." [72]

These rules of construction cannot be distilled from *TVA v. Hill* [73] and are directly contrary to this Court's recent interpretations of the FWPCA in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, —— U.S. ——, 49 U.S.L.W. 4783 (1981), and *E.I. Dupont de Nemours & Company v. Train*, 430 U.S. 112 (1977). There is no presumption that courts possess equitable discretion to fashion new remedies for violations of federal statutes. In *Sea Clammers*, this Court stated that "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." 49 U.S.L.W. at 4787. Similarly, in *E.I. Dupont*, the Court overturned a holding that "provisions for variances, modification and exceptions [to the provisions of the FWPCA] are appropriate to the regulatory process." 430 U.S. at 138 (citing 541 F. 2d 1028). This Court explained that it lacked the discretion to read flexibility into the Act when none was intended by Con-

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[71] Navy Br. 14.

[72] *Id.* 15.

[73] The Navy attaches talismanic significance to this Court's use of the phrase "ordering of priorities" in *TVA v. Hill* to describe the situation in which Congress in unequivocal terms has mandated strict compliance with a federal statute. *See* Navy Br. 16-17. However, the Navy apparently interprets this phrase to refer to situations in which Congress has expressly addressed and ranked various other national interests relative to the interests reflected in a particular federal statute. Congress realistically cannot be expected to reassess and rank national priorities each time a bill is passed into law. At least in cases where, as here, there is no conflict with any other requirement of federal law, an express statutory prohibition is a Congressional priority that must be enforced by the courts. This Court did not intend otherwise by using the phrase "ordering of priorities" in *TVA v. Hill*.

gress: "The question, however, is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . . . It is clear that Congress intended these regulations [new source performance standards under Section 306] to be an absolute prohibition." *Id. See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

B. The Permit Requirement Reflects Congress' Express Intention to Prohibit Point-Source Discharges Made Without a Permit.

The 1972 Amendments to the FWPCA [74] were enacted almost a decade ago because Congress found the federal water pollution control effort prior to 1972 "inadequate in every vital aspect." [75] Congress intended to correct the past failings of water pollution control enforcement efforts under the Rivers and Harbors Appropriations Act of 1899 [76] and the Water Quality Act of 1965.[77] As explained by this Court, the 1972 Amendments "were viewed by Congress as a 'total restructuring' and 'complete rewriting' " of existing water pollution legislation. *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445, 4449 (1981), *quoting from 1 A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 350-51, 359-60 (1973).[78]

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[74] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (cited hereinafter as the "1972 Amendments").

[75] S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971) (cited hereinafter as "Senate Report").

[76] 33 U.S.C. § 401 *et seq.* (1976) (cited hereinafter as the "Refuse Act").

[77] Pub. L. No. 89-234, 79 Stat. 903 (1965), *formerly codified at* 33 U.S.C. § 1151 *et seq. and superseded by* the 1972 Amendments, *supra* n. 74.

[78] This multi-volume compendium of the legislative history of the 1972 Amendments is cited hereinafter as "Legis. His."

Under the Refuse Act, authority to control water pollution was principally confined to industrial polluters. The Refuse Act contained no standards for the discharge of pollutants; it amounted to little more than a declaration that the discharge of refuse was unlawful.[79] The Act contained no effective enforcement mechanism, no program to process and evaluate permit applications and no investigative agency to monitor compliance. This, combined with the limited scope of the Act, made it wholly ineffective as a mechanism for controlling water pollution.[80]

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[79] 118 Cong. Rec. 10780 (1972) (statement of U.S. Attorney, S.D.N.Y., inserted by Rep. Dingell), *reprinted in* 1 Legis. His. 689.

[80] Senate Report 5; 117 Cong. Rec. 38833 (1971), *reprinted in* 2 Legis. His. 1334. The Navy is correct in its observation that Congress in writing the enforcement provisions of the FWPCA drew upon the enforcement provision of the Rivers and Harbors Act. *See* Navy Br. 16. However, the Navy is flatly wrong when it asserts that "there is no indication that at the time Congress acted [to pass the FWPCA] it anticipated any different result" from the ability of courts to fashion "appropriate relief to vindicate the purposes of the statute [the Refuse Act] with due regard to the surrounding facts and circumstances." *Id.* As described herein, there is *every* indication that Congress in unequivocal terms did intend a different result. Congress specifically sought to correct the laxity and flexibility contained in the enforcement provisions. The Refuse Act enforcement procedures were a model that was *not* to be followed.

Even if the enforcement provisions of the Refuse Act did not conflict with the related provisions of the FWPCA, none of the cases cited by the Navy supports the cited proposition that under the Refuse Act "[i]njunctions requiring immediate cessation of discharges in violation of the Act have not been automatic." Navy Br. 16. The relief issued in Reserve Mining Co. v. EPA, 514 F. 2d 492 (8th Cir. 1975), was based upon a violation of the Water Quality Act of 1965 rather than the Refuse Act. The Water Quality Act expressly states that the district court should give "due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved" and may enter orders "as the public interest and the equities of the case may require." Water Quality Act of 1965, *supra* n. 77 at § 5(a) (adding § 10(c)(5) to the FWPCA, 33 U.S.C. § 466). In any event, the court

The Water Quality Act of 1965 proved to be just as ineffective. The Act placed upon states the paramount responsibility for the establishment and enforcement of water quality standards. States were required to adopt water quality standards and obtain the approval of the Secretary of the Interior. Enforcement procedures were extremely cumbersome.[81] A lawsuit could be commenced only if (1) a formal notice of intent to sue preceded the action by at least 180 days, (2) the governor of the state involved consented to the suit, and (3) the pollution had an interstate impact. The Act gave courts broad discretion to enter remedial orders as "the public interest and equities in the cause may require." [82] Congress, in

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did not even consider whether either the Refuse Act or the Water Quality Act conferred equitable discretion to permit an onging violation of the statute. In United States v. Kennebec Log Driving Co., 491 F. 2d 562 (1st Cir. 1973), *on remand*, 399 F. Supp. 754 (D. Me 1975), *aff'd*, 530 F. 2d 446 (1st Cir. 1976), *cert. denied*, 429 U.S. 821 (1977), the court found that there was no Refuse Act violation because of a statutory exemption for logdriving activities. The court remanded for district court adjudication of whether the incidental deposit of log chips was also exempt. The decision in United States v. Rohm & Haas Co., 500 F. 2d 167 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), is similarly inapposite. In that case, the court was required to determine the amount of chemical discharge that would be permissible in the absence of a Refuse Act permit. The government apparently did not request a total prohibition against discharges, so there was no question of whether the court should order a halt to discharges. In neither *Kennebec Log* nor *Rohm & Haas* did the court consider whether it possessed equitable discretion under the Refuse Act to permit a continuing violation.

[81] The Senate Report explained:

> The Committee, of course, has in the record documentation of the poor enforcement performance under the 1965 Act. The Committee concluded that not only were there weaknesses in the procedures established on enforcement, but more importantly, there were weaknesses in the overall design of enforceable requirements.

Senate Report 63.

[82] Water Quality Act of 1965, *supra* n. 77 at § 5(a) (adding § 10(c)(5) to the FWPCA).

short, expressly directed the courts to balance the equities before issuing injunctive relief—an approach that was purposefully jettisoned when the existing water pollution statutes were comprehensively revised in 1972.

The 1972 Amendments reflected a profound shift in Congressional philosophy toward the prevention and control of water pollution. The 1972 Amendments created a new system of regulation based on the application of effluent limitation standards to individual polluters through the establishment of a "National Pollutant Discharge Elimination System" ("NPDES") and the issuance of NPDES permits to would-be polluters. The NPDES permit system became the basic mechanism for enforcing effluent and water quality standards and compliance deadlines for the abatement of water pollution. It was described by its draftsmen as "the most important facet of the new water pollution control program." [83]

Section 301 of the FWPCA expressly provides that it is unlawful for a "point source" to discharge pollutants without the NPDES permit required by Section 402 of the Act.[84] Consistent with this statutory language, this Court has stated that "[*e*]*very* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445, 4449 (1981) (emphasis in original; footnote omitted).

The NPDES permit functions as a condition precedent to the discharge of pollutants. The Senate Report accompanying the 1972 Amendments reflected the change in federal policy: "Unlike its predecessor program which permitted the discharge of certain amounts of pollutants . . ., this legislation would clearly establish that no one has the right to pollute." The Report explains that "the Committee recognizes the impracticality of any effort to halt all pollution immediately. Therefore, this section

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[83] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 125 (1972).

[84] §§ 301, 402, 33 U.S.C. §§ 1311, 1342 (1976 & Supp. III 1979).

[Section 301] provides an exception *if* the discharge meets the requirements of this section, Section 402, and others listed in the bill." [85] Only if a permit is obtained is the discharge of pollutants allowed.

The permit requirement in Section 301(a) is the "enforcement hub" of the Act, at the center of a "web of complex interrelated regulatory programs." *United States v. Holland*, 373 F. Supp. 665, 668 (M.D. Fla. 1974). *See also United States v. Earth Sciences, Inc.*, 599 F. 2d 368 (10th Cir. 1979). The permit is the direct link between the EPA and each discharger. It assures that individual point sources are directly brought into compliance with the Act.[86] It also assures that the EPA, the agency with paramount expertise in the prevention of environmental degradation, has the opportunity to review proposed discharges before they are allowed to foul the nation's navigable waters.[87]

The courts have consistently held that Congress intended the permit to be the only means by which a discharger could escape the total prohibition of Section 301. In three recent decisions under the FWPCA, this Court has indicated that the NPDES permit is a precondition to the discharge of a pollutant. *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445, 4447 (1981) (the FWPCA "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit"); *Train v. Colorado Public Interst Research Group, Inc.*, 426 U.S. 1, 7 (1976); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976).[88] In short, the

[85] Senate Report 42, 43 (emphasis added).

[86] *See* Senate Report 72.

[87] *See e.g.*, 117 Cong. Rec. 38805 (1971) (remarks of Sen. Randolph), *reprinted in* 2 Legis. His. 1272.

[88] *See also* Natural Resources Defense Council, Inc. v. Costle, 568 F. 2d 1369, 1374 (D.C. Cir. 1977); Bethlehem Steel Corp. v. Train, 544 F. 2d 657, 659 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977). In Save Our Sound Fisheries Ass'n v. Callaway, 387 F. Supp. 292 (D.R.I. 1974), the court enjoined the Army from disposing of

text, legislative history, and applicable case law flatly forbid the discharge of pollutants without an NPDES permit.

C. The Mandatory Administrative Review and Compliance Schemes Specified in the FWPCA Preclude Equitable Discretion to Allow an Ongoing Violation of the Permit Requirement.

The mandatory administrative review and compliance schemes established in the FWPCA do not permit courts to exercise equitable discretion to permit an ongoing violation of the permit requirement. If such discretion were allowed, the EPA's administrative review of permit applications would be undermined.[89] A discharger could

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dredged materials in violation of several laws, including the FWPCA. The court there stated:

> The statutory procedures for obtaining a permit . . . before potentially harmful substances are introduced into the water are designed to insure that such decisions are based on specific and informed findings regarding the effect of such dumping on the marine environment.

387 F. Supp. at 299-300. And in Cooper v. Wisdom, 440 F. Supp. 1027 (S.D. Fla. 1977), the court restrained the Army from dredging marine areas under the authority of an invalid NPDES permit. The court stated that because the operation was being carried on without a valid permit, it "has therefore not been evaluated according to established criteria." The court concluded that "the plaintiff's right to protective relief from the effects of an invalid permit is clear." 440 F. Supp. at 1030.

[89] Congress specifically intended that the expertise of the EPA and state administrative agencies would be utilized to analyze the environmental consequences of proposed discharges. As this Court explained in City of Milwaukee v. Illinois, —— U.S. ——, 49 U.S.L.W. 4445, 4451 (1981):

> Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. . . . The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the

pollute unabated until the EPA could deny its permit application and order the discharges to stop. More importantly, as the Navy did in this case, dischargers may be tempted simply to wait until they are sued before filing permit applications; and even then they may try to escape the Act's prohibition against discharges without a permit by arguing, as the Navy did, that the equities should contravene Congress' intent in designing the permit system "to regulate *to the fullest extent possible* those sources emitting pollution . . ." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

In an analogous situation, this Court has held that the statutory deadlines for compliance with the system of pollution abatement are mandatory. *EPA v. National Crushed Stone Association*, 449 U.S. 64 (1980). Considerations of cost and hardship do not excuse noncompliance with these deadlines. Contrary to the assertion of the Navy,[90] the phased system for compliance with technology-based effluent limitations does not evidence any relaxation of the threshold requirement that no discharges should be allowed unless the discharger has obtained a permit. If these deadlines are to be met, then all of the intermediate compliance deadlines must also be observed. There is no intermediate deadline for compliance with water quality standards. The NPDES permit is the initial requirement that must be satisfied to ensure compliance with the effluent limitations and the water quality standards. Each permit must, on a microcosmic level, include terms and conditions that will assure the attainment, on the macrocosmic level, of regional and national enforcement goals. The permit is the enforcement predicate; if permit procedures are not strictly observed, national enforcement goals are jeopardized.[91]

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permit granting process. It would be quite inconsistent with this scheme if the federal courts were in effect to "write their own ticket" under the guise of federal common law . . .

[90] Navy Br. 19.

[91] The Act confers discretion upon the Administrator of EPA to require compliance on an earlier date. *See* 118 Cong. Rec. 33693

The opportunity for public participation in the permit process also evinces Congressional intent not to relieve a discharger from mandatory compliance with the permit process.[92] Congress did not intend that citizens would be required to assume onerous burdens of proof or engage in protracted litigation to compel violators to comply with the Act.[93] "One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations . . . should be based on relatively nar-

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(1972), *reprinted in* 1 Legis. His. 163 (Senator Muskie) ("The Administrator retains the authority to require the application of these controls at an earlier date and it is intended that he will require their application the soonest practicable time."). However, the Act confers no discretion to issue permits that allow compliance after the deadline.

[92] Senate Report 64, 80. Without any reference to the legislative history or objectives of the Act, the Navy asserts that the Act's provision for citizen participation in the formation of remedial orders would "be pointless if every violation of the Act were to be remedied by an immediate cessation order." Navy Brief at 17 n. 17. This assertion is irrelevant. Puerto Rico has never argued, and the Court below did not rule, that every violation would have to be remedied by an immediate cessation order. Puerto Rico, for example, recognizes that a violation that would not recur would not have to be remedied by a cessation order. More importantly, citizens can play a vital role in the enforcement process even though courts do not have the equitable discretion to permit an ongoing violation of the Act. Citizens can present evidence concerning the likelihood of future violations so that a court can determine if injunctive relief is necessary to remedy a statutory violation. Citizens also may present evidence about the types of conduct that must be halted or the types of technology that can be employed by the discharger in order to comply with the Act.

[93] The legislative history demonstrates that Congress intended citizens to play an active role in ensuring prompt compliance. The Senate Report explained that "if governmental agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous action. . . . "[I]f the timetables established throughout the Act are to be met, the threat of sanctions must be real and enforcement provisions must be swift and direct." Senate Report 64, 65.

row fact situations requiring a minimum of discretionary decision making or delay. . . . [*T*]*he issue before the courts would be a factual one of whether there had been compliance.*" [94]

Consistent with these Congressional admonitions, citizens and states have the right to secure prompt compliance with the Act merely by proving that a polluter is discharging without a permit. They are not required to make the costly and time-consuming additional showing that a "balancing of the equities" warrants the issuance of injunctive relief to enforce compliance with the Act, or that there would be irreparable harm if the injunction were not issued. This type of proof would involve the lengthy fact finding and investigation that Congress sought to avoid. Yet that is the burden of proof the Navy seeks to impose on Puerto Rico, on other plaintiffs who seek to enforce the permit requirements of the Act and on the courts.[95]

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[94] Senate Report 64, 80 (emphasis added).

[95] If the Navy's interpretation of the Act's enforcement provisions were adopted as the law, private citizens would be required to overcome potentially insurmountable obstacles and incur substantial costs to enforce the permit requirements of the Act. Consider the instant case as an example. Puerto Rico retained counsel and experts who traveled to the island of Vieques and then to the range in order to assemble information about the Navy's bombing and shelling activities on the marine environment. This information was obtained by snorkeling and scuba diving in the presence of live, unexploded ordnance in the waters. The trial court decided, however, that it should determine not only whether there were illegal discharges but also whether the damage to the marine environment was irreparable and whether this damage outweighed the Navy's asserted national security concerns. If other litigants are required to assume even a small fraction of the burdens assumed by Puerto Rico in order to enforce the Act, the citizens enforcement provisions will be severely weakened and Congress' hopes for avoiding "the necessity of lengthy fact finding" or "investigations" in the enforcement process will be unrealized. The judiciary moreover will be saddled with the onerous burden of evaluating and "balancing" complex evidence concerning such matters as the marine sciences and national security.

The Navy's attempt to read equitable discretion into the Act's permit requirement also overlooks the crucial role played by state governments in the permit process. Section 401 of the Act protects a state's right to impose more stringent requirements than those contained in the proposed permit.[96] A state has the express authority to deny certification of the permit application or attach conditions that must be included in the final permit.[97] If the state denies certification, the EPA may not issue the NPDES permit.

This provision gives each state paramount authority to protect its waters from environmental degradation. This authority would be undermined if a discharger were allowed to pollute while its permit application is under review by the state.

That is precisely the situation before this Court. Although the Navy has intimated that the issuance of a permit for the discharge of munitions into Vieques waters is a mere formality, the Environmental Quality Board of Puerto Rico on December 2, 1981, exercised its authority under Section 401 of the Act to deny certification of the draft NPDES permit prepared by the EPA to authorize these discharges. In its review of the permit application, Puerto Rico set forth the "substantial environmental consequences" that the court below recognized might lead the Administrator to deny the permit.[98] As a result of this decision, consistent with Section 402 of the Act, the EPA must deny the Navy's permit application.

The Navy asserts that equitable discretion to fashion relief is expressly authorized by Section 309(b) of the Act,[99] which gives the Administrator the authority to issue "appropriate relief, including a permanent or tem-

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[96] 33 U.S.C. § 1341 (1976 & Supp. III 1979).

[97] *Id.*

[98] Navy Pet. 49a.

[99] 33 U.S.C. § 1319(b) (1976).

porary injunction." [100] This statutory quotation, however, must be read in the context of the Act's express prohibition against discharges of pollutants without a permit, the purpose of the permit review process, the requirement for swift private enforcement, and the state certification provision.

Even the literal terms of Section 309(b) do not authorize courts to exercise broad equitable discretion. The full text of this provision states that "[t]he Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, *for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.*" (Emphasis added.) The referenced subsection (a), however, leaves no room for discretion to permit an ongoing violation of the Act. Section 309(a)(3) mandates that when the Administrator finds a violation of the permit requirement "he *shall* issue an order requiring such person to comply with such section. . . ." [101] Congress required the EPA to seek "immediate compliance".[102] "[T]o provide opportunity for further delay," observed the Senate Public Works Committee, "would only reward polluters who ignored the requirements of the 1965 Act and penalize those discharge sources who moved quickly to comply." [103]

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[100] Navy Br. 15.

[101] 33 U.S.C. § 1319(a)(3) (1976 & Supp. III 1979) (emphasis added).

[102] Conference Rep., H.R. Rep. No. 92-1465, 92d Cong., 2d Sess. 131 (1972); *see also* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 114 (1972) ("the Administrator . . . *shall* issue an order requiring compliance") (emphasis added).

[103] Senate Report 44. The Administrator's only discretion is to allow a 30-day grace period for the discharger to comply voluntarily with the Act. Section 309(a), 33 U.S.C. § 1319(a) (1976 & Supp. III 1979). The Administrator could extend the grace period beyond thirty days only for a discharger that, *inter alia*, had applied for a permit prior to December 31, 1974. Section 309(a)(5)(B), 33 U.S.C. § 1319(a)(5)(B) (1976 & Supp. III 1979). This limited grace period expired nearly seven years ago and is not relevant here.

Apart from an injunction, the only other relief authorized under Section 309(a) is the issuance of a civil penalty or a criminal penalty. These types of penalties would seem to be "appropriate" in two cases: (1) if violations have ceased and penalties would deter future violations, or (2) if a penalty that would deter future violations should be imposed in addition to an injunction.[104] In no section of the Act and in no portion of the legislative history is it stated that refusal to halt an ongoing violation of the Act would be "appropriate relief" or that the remedial provisions of the Act incorporate the common law "balancing of the equities" approach to injunctive relief.[105]

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[104] In describing the relief available under Section 309(b) of the Act, the House Committee mentioned only injunctive relief and civil and criminal penalties. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 161 (1972). *See also* Senate Report 10.

[105] The citations used by the Navy do not support the proposition that the use of the modifier "appropriate" in Section 309(b), 33 U.S.C. § 1319(b) (1976), authorizes courts to give "due regard to equitable principles." Navy Br. 17. The decisions in Hecht Co. v. Bowles, 321 U.S. 321 (1944), and United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933), do not involve the FWPCA. Professor Moore in his treatise does not discuss the FWPCA. He does state, however, that there is "little or no room for discretion" when a federal statute provides for injunctive relief (citing United States v. City and County of San Francisco, 310 U.S. 16 (1940), for that proposition). 7 *Moore's Federal Practice* ¶ 65.18[3], at 65-135 (3d ed. 1980). The two cited cases that do involve the FWPCA—Realty Income Trust v. Eckerd, 564 F. 2d 447 (D.C. Cir. 1977), and State of Alaska v. Andrus, 580 F. 2d 465 (D.C. Cir.), *vacated in part sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978)—do not interpret Section 309 of the FWPCA. These cases do not discuss the radical departure of this section from the enforcement provision of the Water Quality Act of 1965, which expressly authorizes courts to consider equitable considerations in fashioning relief. The cases also do not address the legislative history of the FWPCA, which mandates that compliance must be swift and unencumbered by the sort of "lengthy fact finding, investigations and negotiations" that would be involved if courts were given equitable discretion to decline to enforce the prohibitions of the Act. Senate Report 65.

Unless Congress has expressly allowed for the exercise of judicial discretion to remedy statutory violations, courts cannot alter the remedial scheme of a federal statute, thereby substituting their own notions of the common weal for Congress' ordering of priorities. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, —— U.S. ——, 49 U.S.L.W. 4783, 4787 (1981) ("In view of [the] elaborate enforcement provisions [in the FWPCA] it cannot be assumed that Congress intended to authorize by implication additional judicial remedies); *City of Milwaukee v. Illinois*, —— U.S. ——, 49 U.S.L.W. 4445 (1981). This guiding principle of statutory construction precludes a court from engrafting equitable discretion onto the clear, mandatory requirements contained in the Act.[106] In this case, the court below correctly applied this principle to enjoin the Navy from further violations of the Act.[107]

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[106] In one critical respect, Puerto Rico's situation differs from the situations the Court addressed in *Sea Clammers* and *City of Milwaukee*. In those cases, the plaintiff sought to obtain additional, more stringent remedies than those expressly provided in the FWPCA, which the Court found occupied the field of federal water pollution control law. In this case, Puerto Rico only seeks enforcement of a remedy that is expressly provided for in the Act. The Navy, by contrast, seeks to weaken the commands and remedies provided in the Act by asking this Court to incorporate into the Act the traditional, flexible and discretionary common law standards that govern the issuance of injunctive relief in private litigation. In essence, Puerto Rico seeks to preserve the integrity of the Act's enforcement scheme while the Navy seeks to weaken it.

[107] The Navy incorrectly characterizes the trial court ruling as one which "brings the Navy into compliance" with the FWPCA. The Navy mistakenly assumes that compliance is accomplished merely by following the procedures that are necessary to obtain a permit. As previously described, the Act specifically forbids the discharge of pollutants *unless and until* the discharger obtains a permit or an exemption. Compliance with the Act by the Navy therefore cannot occur until it obtains a permit or an exemption. In the interim, the Navy is breaking the law.

D. The Legislative History of the FWPCA Manifests a Clear Congressional Intent that Federal Facilities Fully Comply with the Act.

1. *Federal Facilities are to Serve as a Model for Compliance with the Act.*

The ruling of the Court of Appeals properly vindicated Congress' desire to ensure full compliance with the FWPCA by federal facilities. Congress specifically required "[f]ederal facilities to meet the same effluent limitations and water quality standards as private sources of pollution." [108] Federal facilities were to assume the leading role in achieving compliance with the water pollution abatement scheme contained in the Act. The House Report explained that "[t]he Committee, after hearing of numerous examples of flagrant violation of pollution controls, is determined that the Federal facilities shall be a *model for the Nation.*" [109] Federal facilities do not comply with this mandate if they are allowed to violate the Act's permit requirements—the cornerstone for enforcement.

Congress recognized that there are certain limited situations in which these requirements would have to be tempered by countervailing national interests. For these limited situations, Congress drafted the Presidential exemption provisions.

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[108] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 73 (1972).

[109] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118 (1972) (emphasis added). The federal facilities provisions of the FWPCA were modeled on the virtually identical federal facilities provisions in the previously enacted Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1976 & Supp. II 1978). The legislative history of the Clean Air Act provision also manifested Congressional concern for the "flagrant violations of air and water pollution standards by Federal facilities." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 23 (1970). *See also* 116 Cong. Rec. 19205 (1970).

2. *The Presidential Exemption is the Mechanism that Must be Used by Federal Facilities to Authorize Discharges Without an NPDES Permit.*

The Presidential exemption—not the exercise of equitable discretion by courts—is the safety valve for essential federal activities that would otherwise be halted by the statutory permit requirement.[110] The exemption provisions manifest two important objectives that Congress sought to achieve by passage of the FWPCA. They evince Congress' determination that only paramount national interests are sufficiently compelling to justify noncompliance with the permit requirement.[111] They also express Congress' intent that the President—not the federal courts—

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[110] FWPCA § 313, 33 U.S.C. § 1323 (1976 & Supp. III 1979).

[111] Congress also provided narrow, carefully crafted exemptions for industrial dischargers that could prove economic and technological justification for a variance from the deadlines for compliance with promulgated effluent limitation regulations. *See* FWPCA §§ 301(c), 301(g), 302(b)(2), 33 U.S.C. §§ 1311(c), 1311(g), 1312(b)(2) (1976). The existence of these exemptions, in conjunction with the federal facilities exemption, manifest Congress' intent to strictly limit the opportunities for noncompliance with the Act's mandatory restrictions on the discharge of pollutants. This Court's observations in TVA v. Hill, 437 U.S. 153, 188 (1978), forcefully reaffirm this analysis:

> In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, 16 USC § 1539 (1976 ed), creates a number of limited "hardship exemptions," none of which would even remotely apply to the Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim expressio unius est exclusio alterius, we must presume that these were the only "hardship cases" Congress intended to exempt. Cf. National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 US 453, 458 (1974). (footnote omitted)

Similarly, the maxim "expressio unius est exclusio alterius," when applied to the statute in this case, compels the conclusion that noncompliance with the Act's requirements only can be excused if the conduct falls within a statutory exemption.

bear the responsibility of weighing the national interests affected by particular discharges and deciding whether an exemption is necessary. Both of these objectives are well documented in the legislative history of the Act.

In its discussion of the federal facilities section of the Act, the Senate Report stated:

> Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.
>
> The Committee recognizes, however, that it may be in the paramount interest of the United States that a plant or facility not achieve full water pollution control within the time required. Therefore, the bill would provide case by case exceptions, on the basis of determination by the President, for a period of no more than one year.[112]

The Senate Report specifically targeted the Department of Defense as an agency that ought to curb its practice of polluting:

> As recognized under section 313 of the bill, Federal facilities generate considerable water pollution. Since some Federal agencies such as the Department of Defense have failed in abating pollution and in requesting appropriations to develop control measures, it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under section 313.[113]

Congress thus intended that agencies such as the Department of Defense could not continue to disregard the fed-

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[112] Senate Report 67-68.

[113] *Id.* 80.

eral prohibitions against the discharge of pollutants. If the required prohibition interferes with the "paramount interest of the United States," the obvious remedy is the grant of a Presidential exemption. Congress wanted federal agencies that voiced concerns about the national interest to direct their pleas to the Commander-in-Chief. This approach implicitly acknowledges the President's particular expertise to assess national interests.[114]

Congressional insistence on strict federal facility compliance with the Act is reflected in the stringent limitations placed upon an exemption. The President alone is empowered to grant an exemption. Any exemption is limited in time.[115] The President, moreover, must certify that the exemption is in the national interest. Even if an exemption for a federal facility may otherwise be warranted, it cannot be based upon the lack of appropriations unless Congress previously has rejected an Executive Branch request for funds.

When viewed against the structure of the Act and the legislative history of the exemption provision, the trial court's lengthy analysis of national security considerations was clearly inappropriate. Contrary to the Navy's assertion, the exemption provision does not suggest "that national security interests are a proper factor for the court to consider in fashioning appropriate relief where ultimate compliance with the statutory standards can be achieved and the agency has elected to comply

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[114] The exercise of this discretion has been held to be nonreviewable. Carter v. Colon, 633 F. 2d 964, 967 (1st Cir. 1980) ("It is difficult to imagine a determination more fully committed to discretion or less appropriate to review by a court"). The President has already issued one exemption under the Act for the military base on Fort Allen in Puerto Rico. 45 Fed. Reg. 66443 (Oct. 7, 1980). If this exercise of discretion is nonreviewable, then courts necessarily should be precluded from substituting their judgment for the President's: they should not decide whether national security concerns justify noncompliance with the Act in a particular case.

[115] *See* Senate Report 68.

with the Act rather than to seek an exemption." [116] The opposite is true.

Congress intended that national security considerations were to be weighed by the President through the prescribed procedure—not by a district court. A court's "balancing" of national security interests against the Congressional requirements is repugnant to the statutory scheme. Congress did not intend for courts to reassess the costs and benefits of compliance with the Act on a case-by-case basis, nor did it intend to allow courts to usurp the President's role as the sole source of an exemption for federal facilities. The Court of Appeals correctly ruled that the trial court acted improperly by engaging in a balancing exercise. The enforcement scheme and objectives of the Act mandated that this type of balancing was to be performed, if at all, by the President in response to a request for an exemption from the permit requirement.

The opportunity for an exemption makes the case for injunctive relief even more compelling here than in other cases decided by the Court. In *TVA v. Hill*, 437 U.S. 153 (1978), for example, the agency could not escape from its mandatory obligation to refrain from destroying critical habitat. It could only appeal to Congress for a change in the law. By contrast, here Congress has already provided the means for relief: a Presidential exemption. There is no need for a remand to the legislature for a change in the law if the activity in question truly is in the paramount interest of the United States.

The Navy's position in this case cannot be reconciled with the plain requirements of the Presidential exemption provisions of the Act. The Navy has been given what is tantamount to a "judicial exemption" for a period far beyond the one-year period provided by statute. The Navy failed to obtain a permit after the FWPCA was passed in 1972. The Navy permit applica-

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[116] Navy Br. 23.

tion was filed on December 28, 1979. Nearly two years have elapsed since this application was filed. The Navy has yet to obtain a permit or a Presidential exemption that would excuse its noncompliance with the permit requirement. The Navy has violated the Act for the nine-year period since it was passed in 1972. It is flatly contrary to the clear requirements of the Act for the Navy to continue its discharges in the absence of a permit or a Presidential exemption.

CONCLUSION

For the foregoing reasons, Puerto Rico respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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December 21, 1981

STATUTORY APPENDIX

STATUTORY APPENDIX

Most of the pertinent portions of the Federal Water Pollution Control Act, 33 U.S.C. § 1351 *et seq.* (1976 & Supp. III 1979), are reprinted in the Appendix to the Navy's Petition for a Writ of Certiorari at 171-180a. The Navy, however, has omitted portions of the Act that are material to the issues presented in this case. Puerto Rico, therefore, has reproduced below the statutory provisions reproduced by the Navy as well as additional, material portions of the Act:

Section 101, 33 U.S.C. § 1251 (1976 & Supp. III 1979)

Declaration of Goals and Policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

* * * *

Section 301, 33 U.S.C. § 1311 (1976 & Supp. III 1979)

Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

* * * *

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph,

effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

* * * *

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with

respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

* * * *

(g) (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b) (2) (A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a) (4) of this Act, toxic pollutants subject to section 1317(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b) (1) (A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an

unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

Section 302, 33 U.S.C. § 1312 (1976)

Water Quality Related Effluent Limitations

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship

of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this Act.

Section 304, 33 U.S.C. § 1314 (1976 & Supp. III 1979)

Information and Guidelines

* * * *

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

* * * *

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.;

* * * *

Section 309, 33 U.S.C. § 1319 (1976 & Supp. III 1979)

(a) Enforcement

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

* * * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318, 1328, or 1345 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this Act by him or by a State or in a permit issued under section 1344 of this Act by a State, he shall issue an order requiring such person to comply with such section or requirement,

or he shall bring a civil action in accordance with subsection (b) of this section.

* * * *

(5) (B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

* * * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compli-

ance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * *

Section 313, 33 U.S.C. § 1323 (1976 & Supp. III 1979)

Federal Facilities Pollution Control

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. * * * The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted

during the preceding calender year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

Section 401, 33 U.S.C. § 1341 (1976 & Supp. III 1979)

Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such

certification shall not be deemed to satisfy section 1371(c) of this title. * * * If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act, on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Section 402, 33 U.S.C. § 1342 (1976 & Supp. III 1979)

National Pollutant Discharge Elimination System

(a) Permits for discharge of pollutants

(1) Except as provided in section 1328 and 1344 of this title, the Administrator may, after oppor-

tunity for the public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements to paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder subsection (b) of this section.

* * * *

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency,

that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, and 1343;

(B) are for fixed terms not exceeding five years;

* * * *

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365, with sections 1311, 1312, 1316, 1317, and 1343, except any standard imposed under section 1317 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) sections 1311, 1316, or 1342 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the

Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * * *

Section 403, 33 U.S.C. § 1343 (1976)

Ocean Discharge Criteria

(a) No permit under section 1342 of this Act for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 if the Administrator determines it to be in the public interest.

(b) The requirements of subsection (d) of section 1342 of this Act may not be waived in the case of permits for discharges into the territorial sea.

(c) (1) The Administrator shall, within one hundred and eighty days after enactment of this Act (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

> (A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this Act.

Section 502, 33 U.S.C. § 1362 (1976 & Supp. III 1979)

Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and indus-

trial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

* * * *

(12) The term "discharge of pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding, operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

* * * *

Section 504, 33 U.S.C. § 1364 (1976 & Supp. III 1979)

Emergencies

Emergency Powers

(a) Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to be the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

* * * *

Section 505, 33 U.S.C. § 1365 (1976)

Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or

order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.